a

**HOCK HUA BANK BHD & ANOR**

**v.**

**PENGURUSAN DANAHARTA NASIONAL BHD & ANOR**

b

HIGH COURT SABAH & SARAWAK, KUCHING
ZAKARIA SAM JC
[ORIGINATING SUMMONS NO: 24-26-99-II]
23 JANUARY 2002

c ***CIVIL PROCEDURE:*** *Declaration - Application for - Land - Whether plaintiffs have equitable interest - Order for sale - Whether to be set aside*

***LAND LAW:*** *Charge - Order for sale - Existence of agreement requiring prior consent of parties - Failure to obtain pre-requisite consent - Whether order for sale regularly obtained - Whether to be set aside*

d The second defendant, a property developer, entered into a syndicated facilities agreement with certain banks ('the said banks') for a term loan facility related to the development of certain plots of land ('the development lands') and in consideration, the second defendant was to provide first legal charges over the development lands.

e The plaintiffs and the second defendant executed an exchange agreement and two sale and purchase agreements ('the three agreements') which involved certain plots ('the parcels') within the development lands. It was expressly agreed by the parties that the second defendant would not subject the parcels or the development lands to any further encumbrances or additional liabilities f without obtaining prior written consent from the plaintiffs.

Subsequently, pursuant to an acquisition agreement, a vesting certificate was issued where all the rights, titles and interest of the said banks in the syndicated facilities agreement was duly vested in the first defendant.

g When the second defendant defaulted in the repayment of the facilities granted, the first defendant took foreclosure proceedings against the development lands, which included the parcels, and subsequently obtained an order for sale.

Under O. 7 r. 2 of the Rules of the High Court 1980 ('the RHC'), the plaintiffs h applied to this court firstly for a declaration that they have an equitable interest in the parcels; secondly for a declaration that the order for sale in relation to the parcels was not just in the circumstances; and thirdly for an order that the said order for sale be set aside.

i

**Held:**

**[1]** The plaintiffs had performed their respective obligations under the three agreements. They had paid more than RM2 million of the purchase price and upon receiving vacant possession of the parcels (before the acquisition agreement) had spent nearly RM1 million in renovation with a view of occupying the premises. (p 247 h)

**[2]** No charges had been created and entered at the time the plaintiffs entered into the three agreements with the second defendant. Since the charges were created later without the plaintiffs' written consent, it was not just for the first defendant's interest to take precedent over of the plaintiffs' interest regarding the parcels. (p 248 a)

**[3]** Through the syndicated facilities agreement and the acquisition agreement, the first defendant had full knowledge concerning the requirement of obtaining the plaintiffs' prior written consent and this in effect meant that the first defendant consented to the second defendant purchasing the parcels from the plaintiffs. (p 248 b-d)

**[4]** The first defendant knew that the plaintiffs made their payments for the purchase of the parcels through one of the said banks. By not objecting to the payments, the first defendant had in effect consented to it and this gave the plaintiffs a legitimate expectation that the first defendant would disclaim all interests over the said the parcels or alternatively, the payments made to the said bank, in partial repayment of the loan under the syndicated facilities agreement. Thus, when the first defendant foreclosed the development lands, it was inequitable for them to ignore the plaintiffs' equitable interest in the parcels from the order for sale. (p 248 f-g)

**[5]** The first defendant should not be allowed to take advantage of the plaintiffs' failure to register their interest in the parcels. It was a covenant in the three agreements that the plaintiffs agreed not to caveat the parent titles that contained the parcels. (p 249 a)

**[6]** An order for sale of charged land is a final order unless appealed against. The exception to this rule is that where a judgment or order has been obtained by fraud or where further evidence, which could not have been possibly adduced, is forthcoming, then a fresh action will lie to impeach the original proceeding. (p 246 c-f)

**[7]** The foreclosure of the development lands and the parcels therein, was within the ambit and contemplation of s. 148(2) of the Sarawak Land Code which provides that an order for sale could only be made where it was just in the circumstances. (p 246 a-b)

**[8]** Order 92 r. 4 of the RHC grants the court with inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of court. (p 249 c)

**[9]** The non-disclosure of fact that the plaintiffs were a *bona fide* purchaser for value of the parcels and the defendants' failure to obtain prior written consent from the plaintiffs before charging the development lands justified a finding that the order for sale had not been regularly obtained. (p 249 b)

*[Plaintiffs' application allowed with costs.]*

**Case(s) referred to:**
*Buxton & Anor v. Supreme Finance (M) Bhd [1992] 2 MLJ 481* ***(refd)***
*Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143* ***(refd)***
*Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & (Bhagat Singh Surian Singh & Ors, Intervenors) [1996] 4 CLJ 52* ***(refd)***
*Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Another Appeal [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223* ***(refd)***
*MUI Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222* ***(refd)***
*Public Bank Bhd v. Naranayasamy [1971] 2 MLJ 321* ***(refd)***
*Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors [1997] 2 CLJ 58* ***(refd)***

**Legislation referred to:**
Land Code (Cap 81) (Sarawak), s. 148(2)
Rules of the High Court 1980, O. 7 r. 2, O. 20 r. 11, O. 92 r. 4

*For the plaintiff - Frank Tang King Hung; M/s Tang & Partners*
*For the 1st defendant - Lim Lip Tze; M/s Reddi & Co*
*For the 2nd defendant - Sheena Chua; M/s Cheng & Assocs*

*Reported by M Maheswaran*

## JUDGMENT

**Zakaria Sam JC:**

### Application

This is an originating summons taken out by the plaintiffs' under O. 7 r. 2 of the Rules of the High Court 1980 (after this the RHC), for *inter alia*, the following reliefs:

(i) a declaration that the plaintiffs have an equitable interest in the parcels 1.17, 2.18, 3.18 and 4.18 of the Trade Centre at Merdeka Plaza as described in the schedule to the originating summons (after this the 'said parcels');

(ii) a declaration that the order for sale of the said parcels dated 15 September 1998 and made in originating summons No. 24-165-98-III(II) is not just, in the circumstances of the case; and

(iii) an order that the order for sale dated 15 September 1998 and all ancillary orders thereto *vide* originating summons No. 24-165-98-III(II) be set aside in so far as the same relates to the said parcels.

**Background**

The 1st plaintiff, carries on business as a banker and is the registered proprietor of the property described as Lot 26, Section 25, KTLD.

The 2nd plaintiff, carries on business as a finance company and is a subsidiary company of the 1st plaintiff. The 2nd plaintiff is the registered proprietor of the property described as Lot 12, Section 25, KLTD.

The 2nd defendant, a property developer planned to develop Lots 1 to 9, 12 to 14, 21, 25 and 26, all of Sections 25, KTLD (the development lands) into four storey trade centre/complex to be known as Merdeka Plaza.

By a syndicated facilities agreement dated 13 July 1995, Arab-Malaysian Merchant Bank (AMMB), as the manager and security agent for itself, EON Bank Berhad (EON), Sabah Bank Berhad (SBB) and Interfinance Berhad (IFB), as the syndicated lenders, agreed to grant to the 2nd defendant, a term loan facility to the extent of RM8,400,000 and syndicated bridging loan facility of RM46,600,000. In consideration thereof, the 2nd defendant was to provide *inter alia*, first legal charges over the development lands.

Pursuant to an acquisition agreement dated 27 April 1999, a vesting certificate dated 24 May 1999 was issued whereby all AMMB's, SBB's and IFB's right, titles and interest in the syndicated facilities agreement and the relevant charges had been duly vested in the 1st defendant.

In the meantime, on 25 November 1995 the 1st plaintiff entered into the following agreements with the 2nd defendant:

(i) An exchange agreement whereby the 1st plaintiff agreed to exchange Lot 26 Section 25 KTLD for Parcel 1.17 with the 2nd defendant, and

(ii) A sale and purchase agreement (HHB purchase agreement) whereby the 1st plaintiff agreed to purchase from the 2nd defendant Parcel Nos. 2.18, 3.18 and 4.18 to be constructed on the development lands by the 2nd defendant at a purchase price of RM3,764,190.

On the same day, the 2nd plaintiff entered into a sale of purchase agreement (HT sales agreement) with the 2nd defendant, whereby the 2nd plaintiff agreed to sell to the 2nd defendant Lot 12 Section 25 KTLD for the purchase price of RM1.2 million which shall be set off against the purchase price payable by the 1st plaintiff under HHB purchase agreement.

All the three agreements carry the same provisions of 'no further dealing' upon the execution of the said agreements. It was agreed that the 2nd defendant shall not without the prior written consent of the 1st or the 2nd plaintiff subject the parcels or the development lands to any further encumbrances or additional liabilities other than those already subsisting on the titles to the said parcels and the development Lands at the date of the agreements.

(The exchange agreement, HHB purchase agreement and HT sales agreement, after this referred to as 'the three agreements').

All the above three agreements made with the 2nd defendant were made with the knowledge and consent of the 1st defendant (by virtue of the syndicated facilities agreement dated 13 July 1995 and the acquisition agreement dated 27 April 1999).

At the time of the execution of the abovesaid agreements between the plaintiffs and the 2nd defendant, the charges over the development lands have not been created by the 2nd defendant (as stipulated by the syndicated facilities agreement).

The charges were created and registered later by:

i) Memorandum of charge *vide* Instrument No. 1668/1996 over Lots 21 and 25 of Section 25 KTLD, registered on 23 January 1996 which include parcels 1.17, 2.18, 3.18 and 4.18 sold to the 1st plaintiff (the 1st charge) (as varied by Memorandum of Variation of Charge Instrument No. L16452/97 on 16 July 1997).

ii) Memorandum of charge *vide* Instrument No. L8754/1997 on 6 April 1997 over Lots 1, 2, 4, 6, 7, 8, 9, 13 and 14, all of Section 25 KTLD (most of the development lands) - (the 2nd charge).

iii) Memorandum of charge *vide* Instrument No. L166004/97 on 11 July 1997 over Lot 3, Section 25 KTLD (the 3rd charge).

Upon default by the 2nd defendant in the repayment of the facilities granted, the 1st defendant took foreclosure proceedings against the development lands which by then included the said parcels. The order for sale was granted on 15 September 1998.

**The Plaintiffs' Case**

The plaintiffs are contending that they have an equitable interest in the parcels that have been purchased and the order for sale was unjust because of the non-disclosure of two materials facts by the 1st defendant, namely:

(i) The plaintiffs were *bona fide* purchaser for value of the Parcels within the building erected on the development lands that was subject to order for sale dated 15 September 1998, thus, having an equitable interest in the parcels. Both the defendants had full knowledge and consented to the same.

(ii) The 2nd defendant did not obtain the plaintiffs' written consent before further charging the development lands, in breach of an express term of the agreements, hereinbefore described and did not request the plaintiffs to subordinate their equitable interest in the parcels or disclose the existence of the plaintiffs' equitable interest in the parcels which formed part of the development lands referred to in the foreclosure proceedings.

It is also the plaintiffs' case that they were not informed by either the 1st or 2nd defendant of the existence of such charges. This was only discovered through other sources after the order for sale of the charged lands Lots 1-4, 6-9, 13-14, 21 and 25 had been made. Had the plaintiffs been given notice of the originating summons, they would have applied to intervene to protect their interest.

**1st Defendant's Case**

It is the argument of the learned counsel for the 1st defendant that the order for sale of charged land is a final order unless appealed against and once it was made, drawn up and perfected, the judge was *functus officio* and thereafter has no power to set aside the said order. It was further submitted that the order was made on an *inter parties* application. Even though the instant application is by way of a fresh action, the plaintiffs failed to show that the said order for sale was obtained by way of fraud or that the order was null or void on the ground of illegality or lack of jurisdiction which are the only grounds which the court can set aside the order.

It is also the 1st defendant's case that at the time when the 1st and 2nd plaintiff entered into the exchange agreement, HHB purchase agreement and HT sale agreement, the 1st plaintiff knew or ought to have known that the charged lands including the said parcels which have to be constructed on the charged lands are or would be charged to the 1st defendant as stated in the syndicated facilities agreement and the sale of the said parcels were specifically made subject to the said charges.

The 2nd defendant through its counsel informed the court it has no objection to the plaintiffs' application.

**Findings**

The principal issue here is whether the order for sale was just in the circumstances of the case. It is clear that foreclosure of the parcels and the development lands is within the ambit and contemplation of s. 148(2) of the Sarawak Land Code (Cap 81), which provides that an order for sale could only be made as in the circumstances seem just. In light of the statutory provisions, equity was brought into play (see *Kuching Plaza Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Another Appeal* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223; *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & (Bhagat Singh Surian Singh & Ors, Intervenors)* [1996] 4 CLJ 52.

An order for sale of charged land is a final order unless appealed against. Once it is made, drawn up and perfected, the judge is *functus officio* and therefore has no power to set aside the order for sale. Hence, the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or drawn up, except under the slip rule in O. 20 r. 11 Rules of the High Court 1980 so far as is necessary to correct errors in expressing the intention of the court. The court may, however, set aside a judgment entered by default or made in the absence of a party at the trial or hearing (see *Hock Hua Bank Bhd v. Sahari Murid* [1981] 1 MLJ 143, *MUI Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 and *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 CLJ 58). Nevertheless, there are exceptions – if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment (see *Hock Hua*'s case).

It is clear in this instant summons that the order for sale of the development lands had been drawn up and perfected.

The plaintiffs have no right to appeal against the decision since they were not made a party to the foreclosure proceedings. They could not intervene as they had no prior notice of the foreclosure proceedings. Under such circumstances, the only recourse is for the plaintiffs to take out this summons – a fresh action to set aside the said order.

The pertinent question here is whether the failure by the 1st defendant to disclose to the court the existence of the plaintiffs' equitable interest in the said parcels, merits the impeachment of the order for sale?

The learned counsel for the 1st defendant argued that the 1st defendant's interest over the parcels is a legal (registered) interest, whereas the plaintiffs' interest are only equitable in nature. Citing the case of *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ 481, he submitted that the interest of the registered chargee is indefeasible and that the interest of a *bona fide* purchaser for value cannot prevail over a registered chargee. The plaintiffs' equitable interest cannot in law be awarded priority over the legal interest of the 1st defendant.

It is pertinent to note that even though the syndicated facilities agreement was executed on 13 July 1995 the charges were only created and registered on 23 January 1996, 16 April 1997 and 11 July 1997, some time after the plaintiffs had entered into the three agreements with the 2nd defendant (on 25 November 1995), and with the knowledge and consent of the 1st defendant. The HHB purchase agreements and HT sales agreements carry the same provisions of 'no further dealing' that upon the execution of the said agreement, the 2nd defendant shall not without the prior written consent of the plaintiffs subject the parcels or the development lands to any further encumbrances or additional liabilities other than those already subsisting on the titles to the said parcels and the development lands at the date of the agreements.

In all the three agreements, it was expressly stipulated that upon the execution of the agreements the plaintiffs/2nd defendant shall as soon as possible cause a discharge of all the existing encumbrances.

Here, instead of discharging the encumbrances the 2nd defendant without the written consent of the plaintiffs charged the development lands containing the parcels, to the 1st defendant.

The act of subsequently charging the development lands is an infringement of the agreements by both the defendants who knew and consented to the relevant clauses requiring the defendants to seek the plaintiffs' written consent before encumbering the development lands and the parcels subsequent to the execution of the agreements.

It is the submission of the learned counsel for the plaintiffs that had the defendants requested from the plaintiffs prior written consent, the plaintiffs would have insisted for the exclusion of the said parcels from the charges.

The plaintiffs had performed all their respective obligations under the three agreements. To date the plaintiffs had paid about RM2.18 million of the purchase price leaving a balance of RM564,628.50 as the same is not yet due for payment. In fact, upon receiving the vacant possession of the parcels on 6 July 1997, the 1st, plaintiff spent nearly RM1.0 million in renovation, with the view to occupy the premises in reasonable time.

As far as I am concerned, at the time when the plaintiffs entered into the three agreements with the 2nd defendant, no charges had been created and registered, and since the charges were created later without the written consent from the plaintiffs, it is clearly not just for the interest of the 1st defendant to take precedent over the interest of the plaintiffs over the parcels.

The 1st defendant could not deny knowledge of the existence of the requirement for the plaintiffs' prior consent in the said agreements. Clause 7.02(a)(iv)(1) of the syndicated facilities agreement entered into between the 1st and 2nd defendant provides, as a condition precedent, before any drawn down on the facility is to be made, the 1st defendant must be in receipt of certified true copies of the sales and purchase agreements executed between the 2nd defendant and the respective registered proprietors of the development lands and the terms and conditions of which shall be acceptable to the 1st defendant.

The 1st defendant knew and consented to the purchase of the parcels by the plaintiffs from the 2nd defendant. The 1st defendant knew that the plaintiffs had been making payments into the 2nd defendant's account with SBB (one of the syndicated lenders). Exhibits LCK7, LCK8, LCK9, LKC10 and LCK11 were all copies of the covering letters for the remittances made by the plaintiffs on the purchase price. This letters were copied to the M/s Goh & Partners, Advocates, the defendants' mutual solicitors. Even in exh. LCK6, a letter from 2nd defendant instructing the 1st plaintiff to make payment on the purchase price of the parcels to the 2nd defendant's account and it was clearly stated in the letter that the said instruction may not be revoked or amended save with the written consent of the 1st defendant. This letter was also copied to the 1st defendant. The 1st defendant, therefore, knew that the 1st plaintiff was making payment on the parcels to SBB. At no time did the 1st defendant raise any objection on this payment arrangement. By consenting to the payment, it gave rise to a legitimate expectation on the part of the 1st plaintiff that the 1st defendant would disclaim all interests over the said parcels or alternatively, the payments were made to SBB, one of the syndicated lenders, in partial repayment of the loan under the syndicated facilities agreement. These payments would then be applied toward the redemption of the parcels. That being the case, when the 1st defendant foreclosed on the development lands, it is inequitable for the 1st defendant to ignore the existence of the plaintiffs' equitable interest in the parcels from the order for sale. The 1st defendant cannot sell something that essentially no longer belongs to the 2nd defendant (see *Public Bank Bhd v. Naranayasamy* [1971] 2 MLJ 321).

The 1st defendant should not be allowed to take advantage of the plaintiffs' failure to register their interest in the parcels because of the covenant in the agreements upon which the plaintiffs agreed not to caveat the parent titles that contained the parcels.

**Conclusion**

The non-disclosure of the facts that the plaintiffs were the *bona fide* purchaser for value of the parcels and the conduct of the defendants for not obtaining the plaintiffs' written consent before charging the development lands, make it not just to order the sale of the said parcels.

Order 92 r. 4 RHC provides that the court has inherent powers to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of court.

In the above premises I hold that the order for sale dated 15 September 1998 was not regularly obtained. The plaintiffs' application is hereby allowed with costs.